UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 14

Docket No. CH-0353-10-0636-I-2

Elizabeth J. Paszko,

Appellant,

v.

United States Postal Service,

Agency.

February 15, 2013

Elizabeth J. Paszko, Coon Rapids, Minnesota, pro se.

Dynelle M. Tadlock, Esquire, Denver, Colorado, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed for lack of jurisdiction her appeal of the agency's denial of her request for restoration following her partial recovery from a compensable injury. For the reasons set forth below, we GRANT the petition for review and REMAND the appeal for further adjudication consistent with this Opinion and Order.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for

BACKGROUND

¶2 The appellant suffered a compensable injury in 2002 and thereafter the agency assigned her to limited duty. *See* Initial Appeal File, MSPB Docket No. CH-0353-10-0636-I-2 (IAF 2), Tab 5 at 12 (showing date of injury), Tab 16 at 22-23. As of April 2010, the appellant worked at her limited duty tasks sorting mail for 6 hours per day. *See* IAF 2, Tab 16 at 22-23, 31. On April 27, 2010, pursuant to its National Reassessment Process, the agency discontinued the appellant's assignment and offered her a new limited duty Custodian position for 6 hours per day, although a full 6 hours of work every day was not guaranteed. IAF 2, Tab 5 at 11-13. The appellant refused the offer, alleging that the offer was inconsistent with her medical restrictions. *Id.* at 12. The agency requested a suitability ruling from the Office of Workers' Compensation Programs (OWCP) and, on May 21, 2010, OWCP found that the offer was unsuitable because it identified no specific work hours and depended on a daily determination as to how many hours of work were available. IAF 2, Tab 7 at 9.

¶3 The appellant also saw a referee physician at OWCP's direction. IAF 2, Tab 14 at 12-14. The referee physician determined that the job offer was within the appellant's work restrictions with the exception of a few specific tasks. *Id.* at 12-13. OWCP requested that the agency make a new job offer to the appellant consistent with the referee physician's findings. *Id.* at 16.

¶4 On August 11, 2010, the agency made the appellant another offer of 6 hours of modified custodial work that excluded some of the duties set forth in the previous offer which the referee physician said should be eliminated. IAF 2, Tab 14 at 18-20. The 6 hours of daily work in this job offer were also conditioned on the agency's daily assessment of work availability. *Id.* at 20. The

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review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

appellant rejected this offer as well, also on the basis that the assignment exceeded her medical restrictions. *Id.* at 22-25.

¶5 Thereafter, the appellant filed this appeal. She requested a hearing and claimed that the agency's actions constituted disability discrimination. Initial Appeal File, MSPB Docket No. CH-0353-10-0636-I-1 (IAF 1), Tab 1 at 2, 6. The administrative judge dismissed the appeal for lack of jurisdiction without a hearing, finding that, because the appellant rejected a suitable offer of employment, the agency had not denied her request for restoration. IAF 2, Tab 17. The administrative judge did not reach the disability discrimination issue.

¶6 The appellant petitions for review. Petition for Review (PFR) File, Tab 2. The agency responds in opposition to the petition for review. PFR File, Tab 4.

ANALYSIS

Legal Standard

¶7 The Federal Employees' Compensation Act and its implementing regulations at 5 C.F.R. part 353 provide that federal employees who suffer compensable injuries enjoy certain rights to be restored to their previous or comparable positions. 5 U.S.C. § 8151; *Latham v. U.S. Postal Service*, 117 M.S.P.R. 400, ¶ 9 (2012); *Chen v. U.S. Postal Service*, 114 M.S.P.R. 292, ¶ 7 (2010), *overruled on other grounds by Latham*, 117 M.S.P.R. 400, ¶ 10. In the case of a partially-recovered employee, i.e., one who cannot resume the full range of her regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, an agency must make every effort to restore the individual to a position within her medical restrictions and within the local commuting area. *Chen*, 114 M.S.P.R. 292, ¶ 7; 5 C.F.R. §§ 353.102, 353.301(d).

¶8 An individual who is partially recovered from a compensable injury may appeal to the Board for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. *Chen* 114 M.S.P.R. 292, ¶ 8; 5 C.F.R.

§ 353.304(c). To establish jurisdiction over the agency's denial of her requests for restoration, the appellant must prove by preponderant evidence that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the agency's denial was arbitrary and capricious. *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097, 1104 (Fed. Cir. 2011); *Latham*, 117 M.S.P.R. 400, ¶ 10. If the appellant makes nonfrivolous allegations of jurisdiction with respect to all four prongs of the jurisdictional standard, she is entitled to a jurisdictional hearing. *See Bledsoe*, 659 F.3d at 1102.

April 27, 2010 Job Offer

¶9 There is no dispute that the appellant was absent from her position due to a compensable injury and that she has sufficiently recovered to return to work in a part-time or less demanding position. Moreover, we find that the April 27, 2010 job offer constituted a denial of restoration.[2] Specifically, OWCP made a determination that the duties of that job exceeded the appellant's medical restrictions, and the Board is bound by OWCP's determination in that regard. *See New v. Department of Veterans Affairs*, 142 F.3d 1259, 1264 (Fed. Cir. 1998) (decisions on the suitability of an offered position are within the exclusive domain of OWCP, and it is that agency, not the employing agency and not the Board, which possesses the requisite expertise to evaluate whether a position is suitable in light of that employee's particular medical condition); *McDonnell v.*

[2] An offer of 6 hours of work per day may be tantamount to a denial of restoration in certain circumstances. *See Kinglee v. U.S. Postal Service*, 114 M.S.P.R. 473, ¶¶ 13-14 (2010). Those circumstances are not present in this case because there is no indication in the record that the appellant requested or desired more than 6 hours of daily work. The fact that the agency's offer was less than full time does not per se render it a denial of restoration.

Department of the Navy, 84 M.S.P.R. 380, ¶ 9 (1999). Because the job offer was outside the appellant's medical restrictions, it was tantamount to a denial of restoration. *See, e.g., Foley v. U.S. Postal Service*, 90 M.S.P.R. 206, ¶ 6 (2001).

¶10 As to the fourth jurisdictional element,[3] the mere fact that the agency discontinued the appellant's former modified assignment without offering her another assignment within her medical restrictions does not necessarily mean that it was acting arbitrarily and capriciously. The agency may discontinue a modified assignment if the duties of that assignment actually went away or if the agency needed to reassign them to non-limited duty employees who would otherwise not have enough work to do.[4] *See Latham*, 117 M.S.P.R. 400, ¶ 33. Even though the agency was required to search throughout the entire local commuting area for alternative assignments, and the record shows that it did not, *see* IAF 2, Tab 5 at 14, its failure to do so does not necessarily render the denial of restoration arbitrary and capricious if it has a sufficient explanation. *Cf. Chen*, 114 M.S.P.R. 292, ¶ 11 (an agency's failure to conduct a timely job search may constitute a denial of restoration if the delay was extreme and unexplained). For instance, the agency may have declined to extend the job search because it reasonably expected a favorable suitability ruling from OWCP on the April 27, 2010 job offer. We cannot determine from the record whether the April 27, 2010 denial of restoration was arbitrary and capricious. We find, however, that the appellant's allegations are sufficient to raise a nonfrivolous allegation of

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[3] To the extent that the administrative judge reaches the issue on remand, he should apply this same analysis in determining whether the appellant has satisfied the fourth jurisdictional element with regard to the agency's August 11, 2010 job offer.

[4] Notwithstanding the requirements of 5 C.F.R. part 353 and the agency's Employee and Labor Relations Manual (ELM), there is nothing to prevent the agency from assigning a partially recovered employee from one set of modified duties to another. Such an action would not be appealable because it would pertain merely to the "details and circumstances" of the restoration. *See Booker v. Merit Systems Protection Board*, 982 F.2d 517, 519 (Fed. Cir. 1992). It appears that this is what the agency might have been trying to do in making the April 27, 2010 job offer.

jurisdiction entitling her to a jurisdictional hearing. Accordingly, the administrative judge should determine on remand whether the discontinuation of the appellant's former assignment was arbitrary and capricious under *Latham*, 117 M.S.P.R. 400, ¶¶ 31-34 and *Penna v. U.S. Postal Service*, 118 M.S.P.R. 355, ¶¶ 9-11 (2012), and whether it was arbitrary and capricious for failure to conduct a proper job search under *Chen*, 114 M.S.P.R. 292, ¶ 11, and *Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009).

August 11, 2010 Job Offer

¶11 If the administrative judge finds that the April 27, 2010 denial was not arbitrary and capricious[5], he should consider whether the August 11, 2010 job offer constituted yet another denial of restoration. Once again, the issue will be whether the August 11, 2010 job offer was valid. *Compare Foley*, 90 M.S.P.R. 206, ¶ 6 (an offer of restoration that does not comport with an employee's medical limitations may be tantamount to a denial of restoration), *with Ballesteros v. U.S. Postal Service*, 88 M.S.P.R. 428, ¶¶ 7-12 (2001) (the agency did not deny the appellant restoration when it made a valid restoration job offer and the appellant rejected it).

¶12 In determining whether the August 11, 2010 job offer was valid, the administrative judge should first determine whether OWCP made a suitability ruling on the offer. The existing record on this matter is incomplete and requires further development. If OWCP has found that the August 11, 2010 job offer exceeded the appellant's medical restrictions, then the Board is bound by OWCP's determination. *See New*, 142 F.3d at 1264. If OWCP has found that the

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[5] If the administrative judge finds that the April 27, 2010 denial *was* arbitrary and capricious, he should consider the August 11, 2010 job offer from the perspective of remedy. Specifically, if the offer was valid, then the appellant's failure to accept it may limit her right to back pay after August 11, 2010. *See* ELM § 436.2(b) (entitlement to back pay is generally conditioned on the employee making reasonable efforts to obtain other employment).

August 11, 2010 job offer was within the appellant's medical restrictions and otherwise suitable, then the Board is bound by that determination as well. *McDonnell*, 84 M.S.P.R. 380, ¶ 9. If OWCP has not made a ruling on the medical suitability of the August 11, 2011 job offer then the Board is free to make an independent finding on this matter. *Ballesteros*, 88 M.S.P.R. 428, ¶ 9.

¶13 On the other hand, it may be that OWCP ruled the job offer unsuitable because it depended on a daily determination of work without reaching the issue of whether the offer comported with the appellant's medical limitations. As noted in *Dean v. U.S. Postal Service*, 115 M.S.P.R. 56, ¶ 21 (2010), the Department of Labor's regulations at 20 C.F.R. part 10, subpart F and OPM's regulations at 5 C.F.R. part 353, subpart C are related, but they are not entirely commensurate. The administrative judge may consider an OWCP determination as to the suitability of a work schedule in determining whether the job offer was tantamount to a denial of restoration. However, the Board is not bound by OWCP's ruling in this regard because the ultimate question of whether the job offer constituted a denial of restoration falls squarely within the Board's "own statutory sphere of authority." *New*, 142 F.3d at 1264.

¶14 Whether any denial of restoration on August 11, 2010 was arbitrary and capricious is a separate matter. Although the evidence of record is insufficient to resolve the question of whether the agency's August 11, 2010 denial of restoration was arbitrary and capricious, we find, as we did with respect to the April 27, 2010 denial, that the appellant has made a nonfrivolous allegation entitling her to a jurisdictional hearing on this issue.

Disability Discrimination

¶15 The Board lacks jurisdiction over the appellant's claim of disability discrimination per se in the absence of an otherwise appealable action. *Latham*, 117 M.S.P.R. 400, ¶ 58. However, a denial of restoration based on prohibited discrimination is also arbitrary and capricious under 5 C.F.R. § 353.304(c).

Thus, the administrative judge should, on remand, consider the appellant's disability discrimination claim to the extent that it bears on the issue of arbitrariness and capriciousness. *Latham*, 117 M.S.P.R. 400, ¶ 58 & n.27.

Documents Submitted for the First Time on Review

¶16 Finally, the appellant has submitted many documents on review. Many of these documents are already in the record and are not new and material. *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980); PFR File, Tab 2 at 14-22. The remaining documents are not already in the record but they substantially pre-date the close of the record below and the appellant has made no showing that they were previously unavailable despite her due diligence. PFR File, Tab 2 at 6-13. The Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); 5 C.F.R. § 1201.114(b). Thus, we have not considered the documents.

ORDER

¶17 We REMAND this appeal to the Central Regional Office for further adjudication consistent with the above analysis, including a supplemental hearing on the issue of jurisdiction. In addition, should the administrative judge find jurisdiction over the appeal, he shall adjudicate the appellant's discrimination claim.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.